State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

June 12, 2015
PR 15-37

Ms. Linda Lotridge Levin

Re: Access/Rhode Island v. Warren Police Department

Dear Ms. Levin:

The investigation into your Access to Public Records Act ("APRA") complaint filed on behalf of Access/Rhode Island against the Warren Police Department ("Police Department") is complete. You allege the Police Department violated the APRA when it:

1. failed to timely respond to MuckRock's APRA request for written procedures (27 business days), see R.I. Gen. Laws § 38-2-3(e);
2. failed to post APRA procedures on its website, see R.I. Gen. Laws § 38-2-3(d);
3. failed to timely respond to MuckRock's APRA request for a copy of police logs for the past week (18 days), see R.I. Gen. Laws § 38-2-3(e);
4. failed to timely respond to MuckRock's APRA request for arrest log information (6 days), see R.I. Gen. Laws § 38-2-3.2; and
5. failed to timely respond to MuckRock's APRA request for arrest log information for the past twenty-four hours (12 business days), see R.I. Gen. Laws § 38-2-3(e).

In response to your complaint, we received a substantive response from the Police Department's legal counsel, Anthony DeSisto, Esquire, who also provided an affidavit from Deputy Chief Joseph Loiselle. In relevant part, Mr. DeSisto relates that:

> '[e]ssentially, the reason for the delay in response to the requests made by MuckRock, LLC, is because the requests were sent to fax number (401) 245-8220. While a fax machine of this number is located in the Warren Police Department, it is placed in the 'roll-call room.' This fax machine is not regularly monitored by the Warren Police Department personnel who are tasked with responding to APRA requests. Instead, the best and most appropriate fax number to use when making an APRA request is (401) 247-0091, as it is frequently monitored by the appropriate employees. The Warren Police Department is currently taking steps to ensure that this information is prominently displayed on its website. On May 22, 2014, MuckRock, LLC was instructed to use the (401)

> 247-0091 fax number (or email or telephone) when making an APRA request, but MuckRock persisted in using the (401) 245-8220 number.
>
> Because MuckRock used the (401) 245-8820 fax number, they did not come to the attention of the appropriate officer until a follow up request was sent. Additionally, in the complaint, AccessRI inappropriately counts the time while the Warren Police Department was awaiting payment from MuckRock within the ten (10) business days allowed under RIGL § 38-2-4. RIGL § 38-2-7 states that 'production of records shall not be deemed untimely if the public body is awaiting receipt of payment for costs.'
>
> Finally, MuckRock waived its right to receive a response in forty-eight (48) hours under § 38-2-3.2, because it explicitly asked for the request within ten (10) business days instead of forty-eight (48) hours."

The Police Department also challenges Access/Rhode Island's standing to file this complaint. Additional facts will be provided below as necessary. You did not provide a rebuttal.

At the outset, we observe that in examining whether an APRA violation has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether a violation has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Police Department violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

With respect to the arguments that Access/Rhode Island lacks standing to file the instant complaint, we previously addressed this issue in a related complaint and our conclusion is equally applicable to this case. See Access/Rhode Island v. West Warwick School Department, PR 15-24. As such, we review this complaint solely on the basis of this Department's independent statutory basis. R.I. Gen. Laws § 38-2-8(d). Moreover, although Mr. DeSisto suggests that this complaint does not involve denying access to records, and therefore, the APRA provides no remedy, we simply do not agree with this interpretation of the APRA. See R.I. Gen. Laws § 38-2-8(b)("if the attorney general shall determine that the allegations of the complaint are meritorious, he or she may institute proceedings for injunctive or declaratory relief"); § 38-2-9(d)(imposing fines for a "knowing and willful violation of this chapter" and for a public body found to have "recklessly violated this chapter"). Accordingly, we reach the merits of your complaint.

The APRA provides that:

> "[a] public body receiving a request shall permit the inspection or copying within ten (10) business days after receiving a request. If the inspection or copying is not

> permitted within ten (10) business days, the public body shall forthwith explain in writing the need for additional time to comply with the request. Any such explanation must be particularized to the specific request made. In such cases the public body may have up to an additional twenty (20) business days to comply with the request if it can demonstrate that the voluminous nature of the request, the number of requests for records pending, or the difficulty in searching for and retrieving or copying the requested records, is such that additional time is necessary to avoid imposing an undue burden on the public body." R.I. Gen. Laws § 38-2-3(e). See also R.I. Gen. Laws § 38-2-7.

We begin with the Police Department's premise that the fax machine used by MuckRock "is not regularly monitored by the Warren Police Department," and that the "best and most appropriate fax number to use when making an APRA request is (401) 247-0091." Assuming, arguendo, that the Police Department's representation accurately describes the situation, we have been provided no evidence that MuckRock's APRA requests were not made in accordance with the Police Department's APRA procedures. See Access/Rhode Island v. Department of Corrections, PR 15-27. Indeed, the Police Department did not advise MuckRock that it should use the (401) 247-0091 number until May 22, 2014, and by this time, MuckRock had already made two (2) of the four (4) APRA requests that form the basis of your complaint. Since no APRA procedure has been brought to our attention prohibiting the use of the (401) 245-8820 facsimile number – or requiring the use of some other facsimile number or procedure – we find nothing within the Police Department's procedures that prohibited the use of this facsimile number. See Fitzmorris v. Portsmouth Town Council, PR 11-20.

Regarding your first allegation, the evidence demonstrates that on March 31, 2014, MuckRock faxed to the Police Department (through the (401) 245-8820 number) an APRA request, seeking written procedures for access to the Police Department's public records. After having received no response, MuckRock sent a follow-up facsimile on April 15, 2014, which Deputy Chief Loiselle responded to on April 15, 2014, apologizing for the delay, waiving any fee associated with the request, and indicating that the document would be provided "no later than the end of this week." Having received no response, MuckRock sent follow-up emails to Deputy Chief Loiselle dated April 30, 2014 and May 6, 2014. By email dated May 6, 2014, Deputy Chief Loiselle indicated that the APRA policy had been re-written because it contained the name of the former officer who was responsible for APRA. The following day, May 7, 2014, the Police Department provided MuckRock the revised APRA policy.

As noted, supra, we have been presented no evidence that the Police Department's APRA procedures barred a request to the facsimile machine used by MuckRock, but even if we were to ignore MuckRock's APRA request dated March 31, 2014, there is no question that the Police Department was in receipt of MuckRock's APRA request as of April 15, 2014. Indeed, on this date, the Police Department advised MuckRock that it would provide the requested APRA procedures "no later than the end of this week." Using this April 15, 2014 date, we find that the Police Department violated the APRA when it failed to provide the requested APRA procedures

until May 7, 2014–a period of time in excess of ten (10) business days. R.I. Gen. Laws §§ 38-2-3(e); 38-2-7. This violated the APRA.

Next, we consider MuckRock's APRA request seeking "[a] copy of the police log for the past week (7 days)," which was faxed to the Police Department on May 7, 2014 at (401) 245-8220. After not having received a response, on May 22, 2014, MuckRock sent a follow-up facsimile, which Deputy Chief Loiselle responded to on May 22, 2014, requesting that future APRA requests be made in one of various other means (but not by facsimile to (401) 245-8220)) and seeking payment for the instant APRA request. While the Police Department argues that the time to respond to your APRA request was tolled from May 22, 2014 – the date it requested prepayment – to June 3, 2014 – the date MuckRock's prepayment was received by the Police Department, see R.I. Gen. Laws § 38-2-7(b), we must find this calculation irrelevant. The reason for this conclusion is that MuckRock made its APRA request on May 7, 2014, and according to the APRA, the Police Department's APRA response was due within ten (10) business days, i.e., May 21, 2014. Accordingly, by the time the Police Department provided an estimate tolling the time to respond on May 22, 2014, MuckRock's May 7, 2014 APRA request had already been denied as a matter of law and the Police Department had already violated the APRA by failing to respond in a timely manner. See R.I. Gen. Laws § 38-2-7(b)("Failure to comply with a request to inspect or copy the public record within the ten (10) business day period shall be deemed to be a denial.").

With respect to allegations four and five, we find no violations. Specifically, you contend that the Police Department violated the APRA when it failed to respond to MuckRock's June 9, 2014 APRA request in a timely manner, i.e., twelve (12) business days. The evidence establishes that MuckRock sent a facsimile to the Police Department on June 9, 2014, and on June 23, 2014, Muckrock sent a follow-up email to Deputy Chief Loiselle. This time period–June 9, 2014 to June 23, 2014–represents ten (10) business days, thus requiring the Police Department to have responded no later than June 23, 2014. Indeed, Deputy Chief Loiselle responded on June 23, 2014, indicating that the cost of the APRA request was $1.05 and that upon receipt of payment, the responsive documents would be provided. This response had the effect of tolling the Police Department's time to respond. See R.I. Gen. Laws § 38-2-7(b)("the production of records shall not be deemed untimely if the public body is awaiting receipt of payment for costs properly charged under § 38-2-4"). According to Deputy Chief Loiselle's affidavit, payment was received from MuckRock on July 30, 2014, and we have been provided an email from Deputy Chief Loiselle to MuckRock dated July 30, 2014, which indicates that the requested documents were provided to MuckRock on this date. Because R.I. Gen. Laws § 38-2-7(b) provides that "production of records shall not be deemed untimely if the public body is awaiting receipt of payment for costs properly charged under section 38-2-4," and because the time from MuckRock's June 9, 2014 APRA request to the Police Department providing responsive documents totaled ten (10) business days, exclusive of the time awaiting payment, we find no violation. In this respect, since ten (10) business days had elapsed from June 9, 2014 to June 23, 2014, it is significant that the Police Department both received payment and provided responsive

documents on the same date, i.e., July 30, 2014. See R.I. Super. Pro. R. 6(a)("In computing any period of time prescribed or allowed by these rules, by order of court or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included.")(emphasis added).

You also claim that the Police Department failed to respond timely to MuckRock's July 30, 2014 APRA request seeking "[a] copy of the arrest log for the past 24 hours," to include certain information delineated within R.I. Gen. Laws § 38-2-3.2. While R.I. Gen. Laws § 38-2-3.2 indicates that a public body must respond to such a request for information "within forty-eight (48) hours after receipt of a request unless a request is made on a weekend or holiday, in which event the information shall be made available within seventy-two (72) hours," MuckRock's APRA request expressly provided that it "look[s] forward to receiving [the Police Department's] response to this request within 10 business days, as the statute requires." This representation – made in MuckRock's July 30, 2014 APRA request to Police Department – represents a waiver of the time frame set forth in R.I. Gen. Laws § 38-2-3.2. See Gallucci v. Brindamour, 477 A.2d 617, 618 (R.I. 1984)("Generally, a party or parties for whose benefit a right is provided by constitution, by statute, or by principles of common law may waive such right, regardless of the plain and unambiguous terms by which such right is expressed."). Here, the Police Department responded to this APRA request on August 7, 2014 – six (6) business days from the date of MuckRock's APRA request. Since MuckRock indicated that it was seeking a response within ten (10) business days of its request, and since the evidence establishes that its request was fulfilled within these ten (10) business days as set forth in MuckRock's July 30, 2014 APRA request, we find no violation.

Lastly, you allege the Police Department violated the APRA when it failed to post its APRA procedures on its website. The APRA provides that "[e]ach public body shall establish written procedures regarding access to public records[.]" R.I. Gen. Laws § 38-2-3(d). Effective September 2012, "a copy of these procedures shall be posted on the public body's website if such a website is maintained and be made otherwise readily available to the public." Id. Because the Police Department has failed to present any evidence or arguments to contradict your assertion, we find the Police Department's failure to post its APRA procedures to its website violated the APRA.

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the Complainant, requesting "injunctive or declaratory relief." See R.I. Gen. Laws § 38-2-8(b). In this case, for the reasons discussed in West Warwick School Department, PR 15-24, we have reviewed this matter pursuant to the Attorney General's independent statutory authority, and accordingly, any complaint or other action must be initiated on behalf of the public interest and not the Complainant. A court "shall impose a civil fine not exceeding two thousand dollars ($2,000) against a public body...found to have committed a knowing and willful violation of this chapter, and a civil fine not to exceed one thousand dollars ($1,000) against a public body found to have recklessly violated this chapter***." See R.I. Gen. Laws § 38-2-9(d).

In this case, we find injunctive relief is not appropriate. In particular, the documents requested as part of MuckRock's March 31, 2014 and May 7, 2014 APRA requests have been provided, so in this respect, injunctive relief would not be appropriate. While typically we would require a public body that provided documents in an untimely manner to waive or reimburse any fees, see R.I. Gen. Laws § 38-2-7(b), in this case we decline to do so because the entity that paid the fee – MuckRock – is not a party to this complaint. As we suggested in West Warwick School Department, PR 15-24, there is no evidence that Access/Rhode Island provided payment for the documents produced by the Police Department on June 3, 2014. Clearly, requiring reimbursement to an entity that never provided payment would be inappropriate. Moreover, while the evidence demonstrates that MuckRock provided payment to the Police Department, MuckRock is not a party to this complaint and has not sought our relief. Providing relief to an entity that is not a party to this matter and that has not sought relief is also inappropriate. See e.g., Direct Action for Rights and Equality v. Gannon, 713 A.2d 218, 225 (R.I. 1998)("nor was it appropriate for the trial justice to award DARE more relief than it sought"). Additionally, our research reveals that the Police Department's APRA procedures are maintained on its website. Thus, injunctive relief is also inappropriate for this aspect of your complaint.

Despite the foregoing, we deem it appropriate to require additional information in pursuit of this Department's independent statutory authority. Specifically, our concern centers on the Police Department's failure to respond to MuckRock's March 31, 2014 and May 7, 2014 APRA requests in a timely manner. While we understand the Police Department's position that because the (401) 245-8820 facsimile machine was not monitored, MuckRock's APRA requests were not timely discovered, we continue to have questions concerning whether MuckRock's APRA requests to (401) 245-8220 were consistent with the Police Department's APRA procedures, and if so, why the (401) 245-8820 facsimile machine was not monitored. This is particularly the case since we understand that the facsimile machine was located in the roll call room. Moreover, as discussed, supra, even if we use April 15, 2014 as the applicable receipt date, the Police Department's May 7, 2014 response was still untimely. Based upon these concerns we are not prepared to determine at this time whether the instant violations are – or are not – willful and knowing, or reckless.

Therefore, consistent with this Department's practice, and pursuant to this Department's independent statutory authority set forth in R.I. Gen. Laws § 38-2-8(d), the Police Department shall have ten (10) business days from receipt of this finding to provide this Department with a supplemental explanation as to why the instant violations should not be considered knowing and willful, or reckless, violations in light of the APRA, Supreme Court case law,[1] and this

[1] The Rhode Island Supreme Court examined the "knowing and willful" standard in Carmody v. Rhode Island Conflict of Interest Comm'n, 509 A.2d 453 (R.I. 1986). In Carmody, the Court determined that:

> "the requirement that an act be 'knowingly and willfully' committed refers only to the concept that there be 'specific intent' to perform the act itself, that is, that the

Department's precedent. Such a determination by this Department would subject the Police Department to civil fines. At the end of this time period, we will issue our supplemental finding on this matter and determine whether civil fines are appropriate. Because of this Department's determination concerning Access/Rhode Island's lack of standing, and our determination that the Attorney General is pursuing this matter based upon our independent statutory authority set forth in R.I. Gen. Laws § 38-2-8(d), we are closing this file with respect to Access/Rhode Island, but this file remains open with respect to the Attorney General's independent statutory review as discussed supra. Whether Access/Rhode Island would have standing to file a lawsuit is, of course, a decision within the jurisdiction of the Superior Court and not this Department.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

M. W. Field

Michael W. Field
Assistant Attorney General

Cc: Anthony DeSisto, Esquire

> act or omission constituting a violation of law must have been deliberate, as contrasted with an act that is the result of mistake, inadvertence, or accident. This definition makes clear that, even in the criminal context, acts not involving moral turpitude or acts that are not inherently wrong need not be motivated by a wrongful or evil purpose in order to satisfy the 'knowing and willful' requirement." See id. at 459.

In a later case, DiPrete v. Morsilli, 635 A.2d 1155 (R.I. 1994), the Court expounded on Carmody and held:

> "that when a violation of the statute is reasonable and made in good faith, it must be shown that the official 'either knew or showed reckless disregard for the question of whether the conduct was prohibited by [the] statute * * * Consequently an official may escape liability when he or she acts in accordance with reason and in good faith. We have observed, however, that it is 'difficult to conceive of a violation that could be reasonable and in good faith. In contrast, when the violative conduct is not reasonable, it must be shown that the official was 'cognizant of an appreciable possibility that he [might] be subject to the statutory requirements and [he] failed to take steps reasonably calculated to resolve the doubt." (internal citations omitted). Id. at 1164. (Emphasis added).